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No. 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

T. V. WILLIAMS as State Revenue Commissioner,
Petitioner,

v.

STOCKHAM VALVES AND FITTINGS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER,
General Counsel

HARVEY M. CROW,
Associate General Counsel

ALAN M. NEDRY,
Assistant Counsel

918 - 16th Street, N. W.
Washington 6, D. C.

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With the written consent of the parties hereto, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Respondent, Stockham Valves and Fittings, Inc.

INTRODUCTORY STATEMENT

The National Association of Manufacturers is a no profit voluntary business league organized as a membe ship corporation under the laws of the State of Ne York. The Association is composed of more than 21,0 manufacturing concerns, including corporations, par nerships, sole proprietorships and other forms of bus ness enterprises, located throughout the United Stat and its territories. Most of these enterprises engage interstate commercial activities to some degree and u varying forms of sales techniques and marketi methods in the distribution of their products.

This case, as presented, as well as the related issu before the Court in other pending cases, may well affe virtually all business enterprises engaged in intersta commerce activities in connection with the marketi of their products. Thus, a significant segment of t manufacturing community has a vital interest in t issues before the Court in the instant case and co panion pending matters.

QUESTIONS PRESENTED

The questions presented by this case are wheth the State of Georgia may levy its general net inco tax on the interstate selling activities of the Respon ent taxpayer without violating the protection und the Constitution afforded by the commerce clause a the due process clause.

STATEMENT OF CASE AND RULING BELOW

This case does not turn on questions of fact sin the facts have been stipulated by the parties. The fore, the basic issues for decision by the Court a purely ones of law.

The sales and distribution methods employed by the taxpayer here are similar to such methods as used by many other business firms engaged in interstate commerce. The taxpayer here merely maintained a small sales office in Atlanta, Georgia, which serviced a territory of five southern states. A sales representative spent about one-third of his business time in Georgia, serving the other states in his assigned territory the balance of the time. The Atlanta office served as headquarters for this sales territory and a full-time secretary was in this office.

As noted in the stipulation of facts, the sales representative had no authority to accept orders, receive payment, pass on credit or contract on behalf of his employer. The function of this salesman in Georgia, and elsewhere, was merely to solicit orders, promote good will for his employer's products and seek out possible new customers for such products. All goods sold to customers in Georgia were shipped by carrier free on board a warehoue or plant of the taxpayer, all of which were physically located outside of the geographical limits of the State of Georgia. The corporation here had not qualified as a foreign corporation to do business in the state.

Respondent, contending that the Georgia apportioned, corporate net income tax was unconstitutional under the commerce clause and due process clause of the federal Constitution, filed suit for the recovery of taxes paid to the state for the tax years 1952, 1954 and 1955. The Superior Court of Fulton County, Georgia, on July 19, 1957, sustained the taxes as assessed and found that the tax statute "did not constitute a burden on interstate com-

merce nor were they levied or collected in violation of Due Process under the Federal Constitution." An appeal was taken from this trial court order directly to the Supreme Court of Georgia, which Court reversed the trial court on November 8, 1957. The State of Georgia petitioned this Court for a Writ of Certiorari. The Petition for a Writ of Certiorari to the Supreme Court of Georgia was granted by this Court on March, 17, 1958 (2 L. ed. 2d 585).

In deciding the Constitutional questions under the agreed facts of this case a basic element is the interstate nature of the activities of this taxpayer in Georgia. This element would appear to be resolved as a matter of law by the following statement of the Supreme Court of Georgia in its opinion below (213 Ga. 713, 101 S.E. 2d 197):

> "From the foregoing statement of facts it appears *without dispute* that the plaintiff was engaged *exclusively in interstate commerce insofar as its activities in Georgia are concerned.*" (Emphasis added)

ARGUMENT

I. THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES PROHIBITS THE STATES FROM TAXING INTERSTATE COMMERCE. THE ACTIVITIES OF THIS TAXPAYER IN GEORGIA WERE EXCLUSIVELY IN INTERSTATE COMMERCE AND THUS THE GEORGIA NET INCOME TAX IS UNCONSTITUTIONAL.

A. Power to Tax Commerce

The problem of defining the power of the states to levy taxes which may collide with powers delegated to the Congress by the commerce clause of the federal Constitution (Art. I, Sec. 8, Cl. 3) has generated a multitude of decisions by this Court. The Petitioner and the Respondent have each filed briefs reviewing

these decisions which have been referred to as "the tangled underbrush of past cases."[1] We do not believe, therefore, that we can aid the Court by presenting our own review of those cases.

We recognize that accommodating the taxing power of sovereign states with the powers delegated exclusively to the Congress often presents problems of great legal and economic difficulty. Nevertheless, identifying the basic questions presented here is simple; on the facts of this case, resolving such issues is equally simple.

We believe that the constitutional principle controlling this case is well stated in the *Spector Motor* case (footnote 1). In that case this Court made clear (p. 608):

1. That the states, in ratifying the Constitution, "have divided their taxing power between the Federal Government and themselves."

2. That the states delegated to the United States "the exclusive power to tax the privilege to engage in interstate commerce".

3. That, despite the great reach of the reserved taxing power of a state, "the constitutional separation of the federal and state powers makes it essential that *no state* be permitted to exercise, without authority from Congress, those functions which it has delegated *exclusively* to Congress."[2] (Emphasis added)

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[1] Dissent, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 612, 95 L. ed. 573 (1951).

[2] "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the

The Court, in the *Spector* case, thus outlined in broad, yet sound, terms the powers and reservations of powers in this field of taxation.

While the Congress has many times broadly invoked its power to "regulate commerce" among the several States; it has not seen fit to do so in this area of taxation. Neither has it authorized the States to exercise the taxing functions "delegated exclusively to Congress." (See U. S. Const., Art. I, Sec. 8, Cl. 3)

The absence of Congressional expression has, therefore, necessitated judicial application of constitutional principles to interstate commercial activities as affected or touched on by a specific state statute which purports to invoke the inherent taxing power of the state. The Court below, in construing its state's net income tax statute, held (1) that Respondent was "engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned," and (2) that, as applied to Respondent's activities, the state statute violated the Commerce Clause of the U. S. Constitution. We contend that the Georgia Supreme Court applied the proper constitutional principles in reaching its decision and that, on the basis of the Commerce Clause alone, Georgia did not have the right or constitutional power to levy the tax in question in this case.

United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power 'to regulate Commerce with foreign Nations, and among the several States . . .' U. S. Const., Art I, Sec. 8, Cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." (p. 608)

B. Nature and Incidence of the Tax

In determining whether a state tax will stand constitutional challenge, this Court has said in the *Spector* case, *supra* (p. 608) it is not "a matter of labels", but rather the "incidence of the tax provides the answer." In ascertaining the "operating incidence" of a state tax, this Court looks for persuasive guidance to the state courts as to the nature of the tax involved.

In the instant case, the Supreme Court of Georgia has construed the statute of that state and thus has provided this Court with a weighty answer as to the nature and incidence of the tax in issue. Holding that an income tax is in the nature of an excise tax, the Georgia Court stated:

> "Counsel for the defendant contend that a tax on net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce; but, as previously pointed out, *we have held that an income tax is in the nature of an excise tax*, . . ."[3] (Emphasis added)

Here then the highest tribunal of the state found (1) that the taxpayer is engaged exclusively in interstate commerce and, (2) that the tax sought to be imposed is an excise tax. Having determined these factors, it would follow that an excise tax, or a tax

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[3] The Georgia Supreme Court also noted that it had previously considered the incidence of the income tax by stating:

> "In *Forrester* v. *Culpepper*, 194 Ga. 744, 748 (22 S.E. 2d 595), this court quoted with approval from *Interstate Bond Co.* v. *State Revenue Com.*, 50 Ga. App. 744, 751 (179 S.E. 559), the following: 'The general view is that an income tax is not a property tax, but more in the nature of an excise tax.'"

in the nature of an excise tax, as applied to interstate commercial activities, must fall as being violative of the constitutional prohibition against the sole right of the federal government to regulate, and tax, commerce.[4]

Petitioner here would have the Court believe otherwise by the use of labels and semantics designed to be persuasive of the contention that a so-called net income tax is in a special category or is immune from the constitutional proscriptions (p. 28, Pet. Br.). We respectfully submit that these arguments are specious for they disregard the realities of the economic impact of the tax and its practical application in attaching to the flow of interstate commerce. The Supreme Court of Pennsylvania in a recent case[5] holding the net income tax of that state unconstitutional forcefully responded to a similar contention by noting:

> "The Corporation Income Tax Law of 1951 states that it imposes a property tax on net income of certain corporations. While this declaration is entitled to weight, *the nature of a tax depends upon its incidence, not upon its label. If, therefore, in reality, i.e. in its practical operation and effect, the tax is not what it purports to be, the realities control.*" (Emphasis added)

The state would also advocate in support of its tax that it does not burden interstate commerce because

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[4] Respondent has extensively discussed the cases which support this principle. Attention is directed to the leading cases of *Cheney Brothers Co.* v. *Mass.*, 246 U.S. 147, 62 L. ed. 632 (1918); *Alpha Portland Cement Co.* v. *Mass.*, 268 U.S. 203, 69 L. ed 916 (1925); *Spector Motor Service* v. *O'Connor, supra.*

[5] *Commonwealth of Pennsylvania* v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100, *cert. denied*, 352 U.S. 952 (1956).

it is non-discriminatory, i.e. that ". . . it applies without discrimination to non-residents and foreign corporations as well as residents and domestic corporations . . ." (p. 28, Pet. Br.). Such argument is not new nor has it acquired a new luster because of reiteration. This Court has met such contentions previously and in *Freeman* v. *Hewit,* 329 U.S. 249, 91 L. ed. 265 (1946), Mr. Justice Frankfurter noted that the commerce clause was more than an authorization to Congress to protect and encourage commerce, it also created an area of trade free from interference by the states. It was also stated (p. 252):

> "A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. *It is immaterial that local commerce is subjected to a similar encumbrance.* It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and privilege. *But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.*" (Emphasis added)

This opinion then continues by responding to the non-discrimination argument by noting (p. 254):

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. *It cannot justify what amounts to a levy upon the very process*

> *of commerce across State lines by pointing to a similar hobble on its local trade.* It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while *the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce.*" (Emphasis added)

We have quoted extensively from this opinion to point up that notwithstanding the claims of non-discrimination, the "realities" of the tax at hand are such that it exacts a toll from those engaged in national commerce and thereby blocks and impedes such commerce. Such impediment arises out of the actual economic thrust of such a tax.

The Petitioner also seeks to justify the tax by noting that "it is a substantial source of revenue and means of distributing the costs of state government" (p. 28, Pet. Br.). We recognize the needs and desires of the sovereign states to raise revenues sufficient to perform essential functions of government. Yet need for revenue can hardly justify an unconstitutional exercise of the taxing power. The means and methods employed here have been found, we believe correctly, by the Supreme Court of Georgia to trespass upon a power delegated exclusively to the United States which has not authorized the states to act. We believe therefore that the commerce clause, standing alone, prevents Georgia from enforcing its income tax statute in the instant case.

C. Multiple Burden Imposed on Interstate Commercial Activities by Net Income Tax Statutes of the Type Herein Involved

While we believe this case can and should be disposed of on the basis of the power to regulate commerce delegated exclusively to the Congress of the United States, we feel we must also suggest for consideration by the Court certain economic factors touched on by Petitioners.

As we have earlier indicated, the arguments of Petitioner are specious because they disregard the economic realities of the tax here sought to be upheld insofar as it relates to commercial activities in the stream of interstate commerce. One of the "realities" that must be considered in evaluating the constitutional validity of such taxes as are here involved is their broad economic impact. We submit that effectively to dispose of the issues at hand, the Court must look not only to the facts and posture of the instant case, but also consider the actual economic burdens that imposition of such taxes creates for those businesses engaged exclusively in interstate commerce.

One important aspect of this economic impact is the substantial administrative cost of record-keeping in order to comply with the income tax requirements under the present status of the law. Extending the taxing power of the states as advocated here by the Petitioner would soon create an intolerable and highly expensive problem of compliance. If the contentions of the Petitioner are upheld, it can be expected that many other, if not all, of the states would quickly revise their tax laws to embody this concept. However, as is noted below, there would be no uniformity or consistency in the formulas or mechanics of the taxes

so adopted. Such lack of uniformity and consistency would serve to compound the administrative problems and economic thrust of such taxes.

Another impact of such a tax has to do with the actual effect such taxes have in burdening interstate business. The factors of such a tax impeding the flow of commerce can best be illustrated by specific illustrations.

Admittedly, the full scope and impact of this problem is presently an unknown quantity and thus any illustrative or statistical examples can only be currently based on limited samplings. Such samplings are, however, very revealing and may be of interest to the Court.

In July, 1958, the Law Department of this Association conducted an informal survey among the companies represented on the Association's Committee on Taxation. This Committee is composed of executives and tax specialists from approximately 300 business firms manufacturing a variety of products and selling such products under a variety of distribution methods. The representation on this Committee is quite broad as it is made up of companies of all sizes, from all sections of the country, marketing a tremendous array of products so common and essential to our economy.

The questionnaire circulated was simple—by design—and incorporated only three questions. The first question asked for gross sales during the last fiscal year; the second question asked "in how many states did your company have salesmen or did salesmen representing your company travel with some degree of regularity during your last fiscal year." The third question requested "in how many states did your company file tax returns measured by net income for its

last fiscal year." The replies to this questionnaire were on a "blind" basis, that is to say the sender was not required or requested to identify his company.

Replies were received from 178 sources, but of these replies 35 had to be set aside as not responsive, principally because the majority of such responses were from public utilities, banks, insurance companies, or other firms having a similar "special" status. Of the remaining 143 replies there were 4 that were in a further separate category as the companies responding used manufacturers' agents, jobbers or other independent distributors in the distribution and sales of their products.

The remaining 139 replies do provide a revealing insight into the "realities" of the problem. Particularly revealing is the prospective economic impact on smaller and medium-sized companies if this Court upholds the Constitutional validity of the so-called apportioned net income taxes.

The breakdown of the data received is as follows:

Companies Having Annual Sales In Excess of $25,000,000

Total replies received in this group	74
Number of states covered by salesmen	
21 or more states	65
11 — 20 states	8
6 — 10 states	
5 or less	1
	74

Companies paying net income taxes in	
11 or more states	47
6 — 10 states	14
5 — no states	13
	74

Companies Having Annual Sales of $25,000,000 or Less

Total replies received in this group	65
Number of states covered by salesmen	
21 or more states	37
11 — 20 states	4
6 — 10 states	10
5 or less	14
	65

Companies paying net income taxes in	
11 or more states	2
6 — 10 states	10
* 5 — no states	53
	65

* A further breakdown of this category shows:

Number of states	Number of companies
0	9
1	32
2	3
3	4
4	2
5	3
	53

The foregoing figures indicate that many of the larger companies, i.e. those with annual sales in excess of $25,000,000, are now paying income taxes to the various states. Of the 74 companies responding, over half—47—were now paying such taxes in 11 or more states. However, of these companies many maintained warehouses or stocks of goods locally, were qualified to do business in various states or had other reasons for coming within the taxing jurisdiction of the states involved. Moreover, of the 74 companies responding, 65 had salesmen covering 21 or more states, with a major element of this group covering all of the states.

As to the smaller companies responding, that is those with annual sales of less than $25,000,000, 53 companies now paid net income taxes to 5 or less states, 10 companies paid in 6 to 10 states and only 2 companies were currently paying such taxes in 11 or more states. However, in this category there were 37 companies with sales personnel who covered more than 21 states on a regular basis. It should be particularly noted that of the 53 companies in the category involving 5 or less states, these figures show that 32 of such companies were now paying in only one state and it is reasonable to assume that of this group such net income taxes were being paid because of domicile, qualification to do business, warehousing or other comparable factors. Nine of the companies responding did not pay net income taxes in any state even though marketing in interstate commerce.

What the future portends for the smaller and medium-sized companies if the Georgia tax is upheld seems to be obvious. Such companies will immediately be brought into the expanded orbit of paying such

taxes, for it is apparent that if the Georgia tax statute is upheld here, other taxing jurisdictions will soon follow a similar pattern. This observation, we might note, is not based on speculation, but has a sound basis in fact as demonstrated by the developments in recent years following other litigation. That is not to say, however, that larger companies would not be similarly affected for it would appear to follow that more and more companies would be caught up in the taxing activities of more and more states, with the resulting economic burden and impact on interstate commerce.

The foregoing information shows, we believe, that even under the present uncertain status of the law, the ever-increasing encroachments by the various states pursuing the apportioned net income means of taxing interstate commerce has created problems of substantial magnitude. Presently, more and more states are seeking to collect such taxes because of the solicitation activities of salesmen whose activities are an integral part of the flow of commerce. If the lower court is overturned, these diverse, cumulative and inconsistent state tax exactions and reporting requirements would create problems of a scope difficult presently to demonstrate or to fully comprehend. In many areas of business the exactions of state taxes would be such as to cause serious disruptions in established methods of distribution and to give rise to cumulative costs far out of proportion to any purported concomitant benefits.

Petitioner has also raised in its brief (pp. 52-53) the issue of apportionment formulas and rather quickly passes over a further serious practical aspect

of the problem. The State notes that while it is logically impossible to have the same income taxed twice, practically "it could happen". We point out to the Court that taxation of over 100% of net income not only "could happen" under the varying and diverse apportionment formulas in present use—it does happen—with the prospects for alleviation through a uniformity of formulas most unlikely.

While recognizing that this Court has expressed itself on the use of non-discriminatory apportionment formulas,[6] the rationale of these expressions and cases is no doubt limited to discriminations within a given state and not the impact of the whole range of state taxes and the total effect on interstate business. It is the totality of the impact of such taxes that we respectfully urge this Court to consider and weigh in its deliberations.

Petitioner indicates in its brief (p. 52) that "It may be that formula uniformity among income-taxing states is a desirable thing." Assuming, arguendo, that the underlying legal and Constitutional problems can be resolved, a uniform apportionment and allocation concept among the various states does not seem possible of solution as a practical matter, even though it presents a logical theory.

The National Tax Association, and equally respected organizations,[7] have endeavored for many

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[6] Illustrative cases on this point are, *Shaffer* v. *Carter*, 252 U.S. 37, 64 L. ed. 445 (1920); *Underwood Typewriter Co.* v. *Chamberlin*, 254 U.S. 113, 65 L. ed. 165 (1920); and *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 75 L. ed. 879 (1931).

[7] E.g. Report of National Conference of Commissioners on Uniform State Laws, 82 Reports of American Bar Association, p. 174 (1957).

years to develop a workable and acceptable solution to the uniform apportionment problem. However, in all the intervening years the major obstacle to acceptance by the various jurisdictions was the impossibility of harmonizing and reconciling the divergent interests of consuming states and manufacturing states. One element of the uniform apportionment of income concept that arouses such controversy and non-uniform acceptance is the use of the sales-by-destination or sales-by-site-of-solicitation factor. Manufacturing states are reluctant to use this factor in their apportionment formulas and thus, while the theory may be logical, the realities are not. Acceptance is no closer than it was when such studies were initiated back in 1919.

It has been suggested by many authorities in this field of taxation as well as by Petitioner in its brief (p. 52) that "the nature of the problem, with all of its complexities, suggests that any solution of this type [formula uniformity] ought to come from Congress." With this observation we would agree, but, again, facing the practical realities of the situation, there appears to be a notable reluctance on the part of the Congress to accept the problem, let alone effect a workable solution.

An illustration to document this statement is found in a 1953 report of the Committee on Ways and Means, U. S. House of Representatives[8] wherein that committee, which under the Constitution originates tax legislation, made the following comment on state tax jurisdiction (p. 46):

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[8] H. Rept. 2519, 82d Cong., 2d Sess., (1953) "Coordination of Federal, State and Local Taxes".

"Basically, State taxation of business income is much more difficult than Federal taxation since geographic division of income derived from interstate business is necessarily arbitrary to a certain extent. Accordingly, competing jurisdictional claims of the States and multiple taxation of income derived from interstate business are among the most difficult problems in corporate income taxation. *This is inherently a matter for coordination among the several states and not between the Federal Government and the States.*" (Emphasis added)

Moreover, this Congressional Committee, in the same report (p. 48), made the following observations which supports our contentions outlined above:

"Study of this problem at both the Federal and State levels revealed the difficulties involved in developing a formula which would be acceptable to all States. *States which would benefit from a specific formula might be willing to adopt the uniform statute while others to which the formula proved disadvantageous would not accept it. Yet multiple taxation could be prevented only if the uniform statute were adopted universally.*" (Emphasis added)

Thus, it seems clear that notwithstanding the possible logic, economic as well as legal, uniform apportionment is unlikely of achievement and, moreover, the Congress seems to be unwilling at this time to invoke the authority vested by the Constitution. In fact, the Ways and Means Committee has expressly indicated that this is a matter for coordination among the states.

II. THE DUE PROCESS CLAUSE OF AMENDMENT XIV TO THE CONSTITUTION PRECLUDES THE TAXING OF INTERSTATE COMMERCIAL ACTIVITIES.

We believe that Petitioner in its brief (pp. 34-48) has either ignored or inadvertently merged two basic distinctions and legal issues that arise under the due process clause.

The first distinction that arises under this clause has to do with the jurisdiction of the courts of a state over a defendant and whether such person is amenable to the process of such state in an *in personam* action. As to this phase of the problem, it has probably been resolved to some degree by the recent case of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.ed. 2d 223, decided by this Court on December 16, 1957.[9] However, this case seems to be limited to whether a foreign corporation and other non-residents are amenable to the jurisdiction of the courts and process of another state where such defendant is given a reasonable time to appear and defend on the merits. In any event, whether or not Georgia met the requirements of procedural due process is not at issue in the instant matter.

The feature of due process protection that is at issue and should be so drawn is whether a state has substantive jurisdiction over the subject matter—in this instance the right to levy and enforce the net income tax on the interstate activities of the taxpayer.

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[9] But cf., *Hanson* v. *Denckla*, 2 L. ed. 1283 (June 23, 1958), which notes legal restrictions on the personal jurisdiction of state courts as being "territorial limitations on the power of the respective States."

It is in this area that the Petitioner does not delineate the legal distinctions between the two concepts arising under the due process clause. For example, Petitioner makes extensive references to the language of this Court in the case of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 90 L.ed. 95 (1945), which purport to establish as law that the "presence" of the taxpayer here was such as to make it subject to tax. However, examination of the *International Shoe* case reveals that the references of this Court to the "presence" of the Shoe Company and the "nature and quality" of its activities in the State of Washington relate only to whether the company was amenable to the process and jurisdiction of the courts of that state. This Court found that the activities of International Shoe Company and its agents within that state were such that it was amenable to suit in Washington courts. This is an entirely different issue and is not present here. The issue under due process here is the jurisdiction to levy the tax in the first instance. As to that issue there is nothing in the *International Shoe* opinion to guide here since the type and nature of the Washington tax involved bears no relationship to the type, nature or incidence of the tax at issue in this litigation.

We concur with the views expressed by the Georgia Supreme Court when it held that there was a denial of due process because the state sought to tax activities carried on outside its borders. Thereafter, the Court below cited the principle expressed by this Court in the case of *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340, 98 L.ed. 744 (1954). Reference to this language may again be helpful (p. 344):

"The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. * * * Our decisions are not always clear as to the grounds on which a tax is supported, * * *; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. * * * *But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*

"* * * Certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property." (Footnotes omitted, emphasis added)

This statement, as well as others by this Court, returns us to the proposition that the operating incidence of the tax is fundamental in determining liability for the tax. Depending upon the nature of the business of the taxpayer, the incidence of the tax and the factual elements, the taxing powers of a state may or may not be exercised. Thus, domiciliaries may be taxed, sales and use may be taxed, as may be the privilege of employing salesmen within a state. Nevertheless, mere solicitation, however continuous, is

not a sufficient contact with the taxing state to justify the levying of the Georgia net income tax in light of the prohibitions of the Fourteenth Amendment.

CONCLUSION

1. The interstate sales techniques and distribution methods of a large segment of the manufacturing community are essentially identical to the methods employed in this case by the Respondent, Stockham Valves and Fittings, Inc. Commercial activities of this character are such an integral part of the flow of interstate commerce that to levy state net income taxes on such activities violates the Commerce Clause of the Constitution.

2. The multiple economic burdens that attach to interstate commerce under an apportioned net income tax block and impede commerce to an extent and degree that tax statutes of this type contravene the protections afforded business between the states under the Constitution.

3. To impose apportioned net income taxes upon sellers engaged in interstate commercial activities, whose only contact with the taxing state is solicitation, no matter how continuous, is to violate the due process clause of the Fourteenth Amendment.

For the foregoing reasons it is respectfully submitted that the decision of the Supreme Court of Georgia is

correct and should be upheld in its entirety by this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER,
General Counsel

HARVEY M. CROW,
Associate General Counsel

ALAN M. NEDRY,
Assistant Counsel
918 - 16th Street, N. W.
Washington 6, D. C.